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No. 84-648

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

SEDIMA, S.P.R.L.

PETITIONER,

v.

IMREX CO., INC.,
GIDON ARMON AND JACOB ARMON,

RESPONDENT.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR AMICI CURIAE IN SUPPORT OF PETITIONER

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PETITIONER,

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INTEREST OF AMICI CURIAE

This brief is submitted on behalf of the State of Arizona, Alaska, California, Colorado, Connecticut, Florida, Hawaii, Idaho, Illinois, Indiana, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nevada, New Jersey, New Mexico, New York*, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming.**

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*The State of New York wishes to express its support for the positions expressed by Amici without formally joining on the brief.

**The assistance in the preparation of this brief of Professor G. Robert Blakey of the Notre Dame Law School and Blake A. Bailey (Notre Dame '86), Thomas F. Merrick (Notre Dame '86), Christine M. North (Notre Dame '85), Maryellen O'Neil (Notre Dame '86), Donald H. Passenger (Notre Dame '86), Olga F. Pribyl (Notre Dame '85), David C. Scheper (Notre Dame '85), Beth A. Schneider (Notre Dame '86), and Louis J. Weber III (Notre Dame '85), is hereby acknowledged.

In 1970, Congress enacted the Organized Crime Control Act, Title IX of which is known as "RICO." Congress designed the Act to "strengthen[] the legal tools in the evidence-gathering process, . . . [to] establish[] new penal prohibitions, and . . . [to] provide[] enhanced sanctions and new remedies . . . ." Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 923 (1970) (codified at 18 U.S.C. § 1961 (1982)). Congress found that "the sanctions and remedies available" under the current law were "unnecessarily limited in scope and impact." *Id.* Since 1970, the government has used RICO in criminal prosecutions against organized criminal groups, *United States v. Brooklier,* 685 F.2d 1208, 1213 (9th Cir. 1982) ("La Cosa Nostra"), *cert. denied,* 459 U.S. 1206 (1983); political corruption schemes, *United States v. Mandel,* 591 F.2d 1347, 1353, *aff'd by an equally divided court en banc,* 602 F.2d 653 (4th Cir. 1979) (governor of Maryland), *cert. denied,* 445 U.S. 961 (1980); white-collar business offenses, *United States v. Tamura,* 694 F.2d 591, 594 (9th Cir. 1982) (kickbacks from Japanese corporation); *United States v. Marubeni America Corp.,* 611 F.2d 763, 764 (9th Cir. 1980) (payoffs by Japanese corporation), and terrorist groups, *United States v. Bagaric,* 706 F.2d 42, 46 (2d Cir.) (Croatian nationalist), *cert. denied,* 104 S. Ct. 283 (1983). The government has also brought civil suits to free unions dominated by criminal groups. *United States v. Local 560, International Brotherhood of Teamsters,* 581 F. Supp. 279, 282 (D.N.J. 1984), *appeal pending.*

Since 1970, twenty-two states, including Arizona, have followed Congress' lead by adopting similar legislation.[1] The states have employed this legislation in criminal

[1]See Appendix A for the text of Federal RICO. See Appendix B for a resolution of the National Association of Attorneys General.

prosecutions against a wide variety of illegal conduct.[2] Additionally, both state governments and private plaintiffs have used it in civil litigation.[3] Federal RICO decisions have played a vital role in interpreting and upholding analogous state RICO legislation.[4]

Distressingly, however, recent decisions by the lower federal courts manifest a distinct hostility toward the use of civil RICO.[5] State civil RICO defendants are using these decisions to challenge the state legislation and to urge the narrowing of its scope.[6] In the context of federal litigation with pendent state claims, federal courts are also unjustifiably reading into state legislation limitations not intended

[2]*See, e.g., Carlson v. State,* 405 So. 2d 173, 174 (Fla. 1981) (house of ill fame); *Dorsey v. State,* 402 So. 2d 1178, 1180 (Fla. 1981) (drugs); *State v. Whiddon,* 384 So. 2d 1269, 1270 (Fla. 1980) (theft, burglary, arson, and arson to defraud); *Moorehead v. State,* 383 So. 2d 629, 630-31 (Fla. 1980) (auto theft).

[3]*See, e.g., Arizona ex rel. Corbin v. Pickrell,* 136 Ariz. 589, 591, 667 P.2d 1304, 1306 (1983) (securities fraud); *Banderas v. Banco Central del Ecuador,* 10 Fla. Law Weekly 107, Jan. 11, 1985 (foreign exchange fraud).

[4]*See, e.g., Baines v. Superior Court,* 688 P.2d 1037, 1040 (Ariz. Ct. App. 1984) ("[i]n the absence of any Arizona cases, we will look to federal decisional law for guidance"); *Roush v. State,* 413 So. 2d 15, 20-21 (Fla. 1982) (constitutionality of RICO-type civil remedies upheld relying on federal decisions); *Moorehead v. State,* 383 So. 2d at 630-31 (constitutionality of "pattern" in Fla. RICO statute upheld relying on federal decisions.)

[5]*See generally* Horn, *Judicial Plague Sweeps United States 'Resultorientitis' Infects Civil RICO Decisions,* 5 Nat'l L. J., May 23, 1983, at 31, col. 1.

[6]*See, e.g., Arizona ex rel. Corbin v. Pickrell,* 136 Ariz. at 596, 667 P.2d at 1311 (distinct injury limitation rejected, but urged based on federal decisions); *Banderas v. Banco Central del Ecuador,* 10 Fla. Law Weekly at 108-09 n.3 (organized crime limitation rejected; "garden variety" fraud exclusion rejected, but urged, citing *Sedima, S.P.R.L. v. Imrex, Co.,* 741 F.2d 482 (2d Cir. 1984)).

by the state legislature, threatening to frustrate the legislative design.[7] Amici view these developments as ominous because they threaten the exercise of state sovereignty. State legislatures have chosen to follow the 1970 Act, sometimes narrowing, sometimes expanding on the federal model. "Resolution of the pros and cons of whether a statute should sweep broadly or narrowly is for" the legislative branch. *United States v. Rodgers,* 104 S. Ct. 1942, 1948 (1984). A court is "not at liberty to imply . . . condition[s] which . . . [are] opposed to the explicit terms of . . . [a] statute . . . . To [so] hold . . . is not to construe the . . . [statute] but to amend it." *Fedorenko v. United States,* 449 U.S. 490, 513 (1981) (quoting *Detroit Trust Co. v. The Thomas Barlum,* 293 U.S. 21, 38 (1934)). Accordingly, Amici urge this Court to set its hand firmly against these unconstitutional encroachments of Article I legislative power by Article III courts. *See* R. Jackson, *The Struggle for Judicial Supremacy* 40 (Vintage ed. 1941) ("unwelcome legislative [actions undermined by] 'interpretation' . . . [that] eviscerate[s] them.").

STATEMENT

For the statement of the facts and course of legal proceedings below, the Court is respectfully directed to the briefs of the parties.

Two issues are presented:

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[7]*See, e.g., Plains Resources, Inc. v. Gable,* Civil No. 83-JM-2145, slip op. at 3–5, (D. Colo. 1984) (organized crime limitation read into federal and Colorado RICO statutes), *appeal pending; Divco Construction & Realty Corp. v. Merrill Lynch Pierce Fenner & Smith, Inc.,* 575 F. Supp. 712, 714 (S.D. Fla. 1983) (organized crime limitation read into federal and Fla. RICO statutes in securities fraud area).

(1) Is a private plaintiff's right to recover under civil RICO conditioned on a showing of a prior criminal conviction? (no)

(2) Is a private plaintiff's right to recover under civil RICO conditioned on a showing of distinct injury? (no)

This brief will address issue number one. Amici will file a second brief that will address issue number two and other considerations in behalf of respondents in *American National Bank and Trust Co. v. Haroco, Inc.,* No. 84-822.

SUMMARY OF ARGUMENT

In 1970, Congress enacted the Organized Crime Control Act, Title IX of which is known as "RICO." Neither the Organized Crime Control Act generally, nor Title IX particularly, was limited to organized crime. RICO provides for criminal and civil sanctions; it also mandates the liberal construction of its provisions. Nothing in the text, legislative history, or purpose of RICO, justifies circumscribing its private civil remedies with a prior criminal conviction requirement or an organized crime limitation.

ARGUMENT

I. RICO WAS BROADLY DRAFTED WITH PUBLIC AND PRIVATE REMEDIES AS GENERAL REFORM AND IT IS TO BE LIBERALLY CONSTRUED TO EFFECTUATE ITS REMEDIAL PURPOSES.

In 1970, Congress enacted the Organized Crime Control Act, Title IX of which is known as the Racketeer Influ-

enced and Corrupt Organizations Title (RICO).[8] RICO's "legislative history clearly demonstrates that . . . [Congress] intended [RICO] to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots." *Russello v. United States,* 104 S. Ct. 296, 302 (1983). "[T]he major purpose of Title IX [was] to address the infiltration of legitimate business by organized crime." *United States v. Turkette,* 452 U.S. 576, 591 (1981). Nevertheless, "courts are all but unanimous in their refusal to read RICO as prohibiting *only* the infiltration of legitimate organizations." *United States v. Altomare,* 625 F.2d 5, 7 n.7 (4th Cir. 1980) (emphasis added). As such, they faithfully reflect the teaching of *Turkette,* 452 U.S. at 590 ("unpersuaded that Congress . . . confined . . . RICO [to] *only* the infiltration of legitimate business.") (emphasis in original). "[R]ejected [too, has been the] notion that . . . [RICO] applies *only* to organized crime in the classic 'mobster' sense." *United States v. Grande,* 620 F.2d 1026, 1030 (4th Cir.) (emphasis added), *cert. denied,* 449 U.S. 919 (1980). No court of appeals has applied a different rule in a civil context.[9]

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[8] *See generally* Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg,* 58 Notre Dame L. Rev. 237 (1982) (hereinafter cited as *Civil Action)*; Blakey and Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts — Criminal and Civil Remedies,* 53 Temp. L. Q. 1009 (1980) (hereinafter cited as *Basic Concepts*); Note, *Civil RICO: The Temptation and Impropriety of Judicial Restriction,* 95 Harv. L. Rev. 1101 (1982).

[9] *See, e.g., Alexander Grant & Co. v. Tiffany Industries,* 742 F.2d 408, 413 (8th Cir. 1984). District courts, however, continue to read into the statute an organized crime limitation in civil litigation. *See, e.g., Aliberti v. E.F. Hutton & Co., Inc.,* 591 F. Supp. 632, 633 (D. Mass. 1984); *Mon-Shore Management, Inc. v. Family Media, Inc.,* 584 F. Supp. 186, 194-95 (S.D.N.Y. 1984). Accordingly, it is important that this Court firmly establish that RICO sets *one* standard for *all,* to which alternative, but not exclusive, criminal and civil sanctions may be applied and that RICO may *not* be read differently depending on *who* is the defendant or *who* is the plaintiff. Basic concepts of the rule of law require no less. *Magna Carta,* ch. 25 ("one measure of wine . . . through . . . [the] Realm").

One court has objected that so reading RICO works "a revolutionary consequence [nowhere noted] in the legislative history." *Moss v. Morgan Stanley Inc.,* 553 F. Supp. 1347, 1361 (S.D.N.Y. 1983), *aff'd on other grounds,* 719 F.2d 5 (2d Cir. 1983), *cert. denied,* 104 S. Ct. 1280 (1984). The facts do not support that proposition. First, the scope of RICO, as *general* reform *not* limited to organized crime, *is* noted repeatedly in the legislative history. *See Civil Action, supra* n.8, at 272-73, particularly nn.112-13; 275-79, particularly n.116. Second, and most importantly, this proposition ignores the structure of the entire Organized Crime Control Act. The Act is composed of eleven substantive titles, each of which (with two principal exceptions) Congress drafted in light of the *problem* of organized crime, but consciously enacted as *general* reform.[10] This structure is relevant in construing the Organized Crime Control Act, *Iannelli v. United States,* 420 U.S. 770, 786-91 (1975), including RICO, *Russello,* 104 S. Ct. at 300.

Only Titles V (witness protection) and VI (depositions) were limited by Congress to "organized criminal activity." 84 Stat. 933 (1970); 84 Stat. 934 (1970) (codified at 18 U.S.C. § 3503 (1982)).[11] The presence of this limitation in Titles V and VI clearly indicates Congress' intent *not* to have it (or any phrase similarly limiting the scope of the Act) read into its general provisions. *Russello,* 104 S. Ct. at

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[10] *See* Title I (grand jury: indictments not limited, but reports limited to "organized crime conditions"); Title II (immunity: applicable to all court, administrative and congressional proceedings), Title III (all recalcitrant witnesses); Title IV (all false declarations); Title VII (all sources of evidence); Title VIII (all syndicated gambling); Title X (all sentencing); and Title XI (all explosives).

[11] Even that phrase has been appropriately read broadly to include "white collar crime." *United States v. Carter,* 493 F.2d 704, 708 (2d Cir. 1974) (construction of Section 3503). *But see United States v. Singleton,* 460 F.2d 1148, 1155-59 (2d Cir. 1972) (Oakes, J., dissenting).

300; *United States v. Aleman*, 609 F.2d 298, 303-04 (7th Cir. 1979) ("Congress knew . . . how to limit a provision . . . if that was what was intended."), *cert. denied,* 445 U.S. 946 (1980). *See also Ohio v. Kovacs*, 105 S. Ct. 705, 709 (1985). Congress, in effect, removed that limitation from Title VI in 1975, 89 Stat. 373, 374 (1975). It was removed from Title VI in 1975, 89 Stat. 373, 374 (1975). It was removed from Title V in 1984, Witness Security Reform Act of 1984, 98 Stat. 2153 (1984). Indeed, on each subsequent occasion that Congress has acted and amended the Organized Crime Control Act or RICO, it has broadened, not narrowed it. Finally, courts have rejected efforts to deny that the 1970 Act worked *general* reform under its other titles.[12] Accordingly, the Organized Crime Control Act, including Title IX, conforms to a consistent pattern of federal legislation enacted over the past half century as general reform aimed at a specific target, but not restricted in its drafting to that specific target.[13]

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[12] *See, e.g., United States v. Box*, 530 F.2d 1258, 1265 n.19 (5th Cir. 1976) (Title VIII (18 U.S.C. § 1955 (1982)) not limited to organized crime); *United States v. Sacco*, 491 F.2d 995, 1011-13 (9th Cir. 1974) (Ely, J., dissenting) (Title VIII unconstitutional under commerce clause, since not limited to organized crime); *United States v. Schell*, 692 F.2d 672, 674 (10th Cir. 1982) (Title X (18 U.S.C. § 3575 (1982)) not limited to organized crime); *United States v. Schwanke*, 598 F.2d 575, 578 (10th Cir. 1979) (Title XI (18 U.S.C. § 844 (1982)) not limited to organized crime).

[13] *See, e.g.*, 18 U.S.C. § 224 (1982) (sports bribery) held not limited to organized crime in *United States v. Walsh*, 544 F.2d 156, 159 (4th Cir. 1976), *cert. denied,* 429 U.S. 1093 (1977); 18 U.S.C. §§ 891-894, 896 (1982) (loan sharking) held not limited to organized crime in *United States v. Keresty*, 465 F.2d 36, 43 (3d Cir. 1972), *cert. denied*, 409 U.S. 991 (1972); 18 U.S.C. § 1510 (1982) (obstruction of criminal investigation) held not limited to organized crime in *United States v. Koehler*, 544 F.2d 1326, 1330 n.6 (5th Cir. 1977); 18 U.S.C. § 1951 (1982) (extortion) held not limited to racketeering in *United States v. Culbert*, 435 U.S. 371, 373-74 (1978); 18 U.S.C. § 1952 (1982) (Travel Act) held not limited to organized crime bribery in *Perrin v. United States*, 444 U.S. 37, 46 (1979); *United States v. Wander*, 601 F.2d 1251, 1257-58 (3d Cir. 1979) (not limited to organized crime); 18 U.S.C. § 1953 (1982) (lottery tickets) held not limited to organized crime in *United States v. Fabrizio*, 385 U.S. 263, 265-67 (1966); 18 U.S.C. § 2113(b) (1982) (bank robbery) held not limited to gangsters in *Bell v. United States*, 103 S. Ct. 2398, 2400-02 (1983); 18 U.S.C. § 2114 (1982) (assault on custodian of property of United States) held not limited to postal carriers in *Garcia v. United States*, 105 S. Ct. 479, 481-85 (1984); 18 U.S.C. §§ 2421-2424 (1982) (white slave traffic) held not limited to commercial prostitution in *Caminetti v. United States*, 242 U.S. 470, 485-90 (1917).

18 U.S.C. § 1962 sets forth "standards" of "unlawful" conduct, which are enforced through "criminal" and "civil" sanctions. Section 1962 says "unlawful," not "criminal." As such, RICO is not, as some courts have stated, "primarily a criminal statute." *In re Action Industries Tender Offer*, 572 F. Supp. 846, 849 (E.D. Va. 1983). Section 1963 sets out the criminal remedies, which include imprisonment, fine and criminal forfeiture. Section 1964 provides civil remedies, including injunctive and other equitable relief, as well as treble damages. "Person" under 18 U.S.C. § 1961(3) defines the class who may sue or be sued civilly under Section 1964 for violations of Section 1962; by contrast, "whoever" under 1 U.S.C. § 1 defines the class who may be indicted for violations of Section 1962 under the criminal provisions of Section 1963. *See Civil Action* at 243 n.20; *Basic Concepts, supra*, n.8 at 1021 n.71. Accordingly, the class of defendants under criminal RICO is more restricted than the class of defendants under civil RICO. As such, RICO's civil scope is broader than its criminal scope; RICO is not, therefore, primarily criminal or punitive, but primarily civil and remedial. *See United States v. One Assortment of 89 Firearms*, 104 S. Ct. 1099, 1105-06 (1984) (dealing with 18 U.S.C. §§ 922(a)(1), 924(d) (1982)).[14] Its civil remedies, which require no more than a showing of a preponderance of the

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[14] *See also* 115 Cong. Rec. 6,993 (1969) (statement of Sen. Hruska: "The criminal provisions [of RICO] are intended primarily as an adjunct to the civil provisions which I consider as the more important feature of the bill"). The reliance of *Sedima, S.P.R.L. v. Imrex Co.*, 741 F.2d 482, 500 n.49 (2d Cir. 1984) on *Boyd v. United States*, 116 U.S. 616, 634-35 (1886) in arguing for a contrary view is misplaced in light of this Court's decisions, not only in *One Assortment of 89 Firearms*, 104 S. Ct. at 1104

evidence, are available to either the government or private parties. *United States v. Cappetto*, 502 F.2d 1351, 1357 (7th Cir. 1974) (government suit), *cert. denied*, 420 U.S. 925 (1975); *Alcorn County, Miss. v. U.S. Interstate Supplies, Inc.*, 731 F.2d 1160, 1166-67 (5th Cir. 1984) (private suit).

Congress could not have more clearly manifested its intent that courts construe RICO as a remedial statute containing both criminal and civil sanctions. 84 Stat. 947 (1970) ("remedial purposes"); S. Rep. No. 617, 91st Cong., 1st Sess. 82 (1969) (Title IX "is remedial rather than penal"). When Congress so classifies a statute, the classification is entitled to great deference. *One Assortment of 89 Firearms*, 104 S. Ct. at 1106. Statutory classifications, moreover, control over federal common law classifications. *City of Milwaukee v. Illinois*, 451 U.S. 304, 312-15 (1981). Accordingly, this Court has recognized the remedial character of civil RICO. *Turkette*, 452 U.S. at 593 (RICO is "both preventive and remedial"). The traditional canon of statutory construction for such statutes requires courts to construe them liberally. *Brady v. Daly*, 175 U.S. 148, 154-58 (1899) (certain sum damages); *Farmers' and Mechanics' Nat'l Bank v. Dearing*, 91 U.S. 29, 35 (1875) (statutory forfeiture). Congress, of course, settled the issue of what canon of construction courts should use in interpreting RICO by including a liberal construction clause. 84 Stat. 947 (1970) ("The provisions of . . . [RICO] shall be liberally construed to effectuate its remedial purposes.") A majority of the lower courts have faithfully followed the liberal construction clause under RICO's criminal provisions. *Civil Action* at 245 n.25, 288 n.150. Those judges who have questioned its application in criminal cases have generally conceded its application in civil cases. *See, e.g., United States v. Mandel,*

(Coffey v. United States, 116 U.S. 476 (1886) *(Boyd extended)* "disapproved") *but* also *Fisher v. United States*, 425 U.S. 391, 407-08 (1976) (*Boyd* "not stood the test of time").

415 F. Supp. 997, 1022 (D. Md. 1976), *rev'd on other grounds*, 591 F.2d 1347, *aff'd by equally divided court en banc*, 602 F.2d 653 (4th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980). Nevertheless, judicial acceptance of the liberal construction directive has, in fact, been mixed on the civil side.[15] Judicial hostility to the application of the liberal construction clause to civil RICO is unjustified, and its impact on these appeals is decisive.[16] The language of RICO should be read in the

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[15] *Compare USACO Coal Co. v. Carbomin Energy, Inc.*, 689 F.2d 94, 95 n.1 (6th Cir. 1982) ("Congress intended that RICO be liberally construed . . .") *with Saine v. A.I.A., Inc.*, 582 F. Supp. 1299, 1305 (D. Colo. 1984) (treble damages must be strictly construed).

[16] This Court in *Russello*, 104 S. Ct. at 302 noted the unusual character of the liberal construction clause in a federal criminal statute. Such a liberal construction clause is not unusual in state law. It had its origins in the codification movement of the 19th century. Edward Livingston suggested the rejection of the old common law rule of strict construction in the farsighted code he drafted for Louisiana between 1820 and 1825. 1 E. Livingston, *Complete Works on Criminal Jurisprudence* 231 (1873 ed.) and 2 *Complete Works* 14 ("all penal laws whatever are to be construed according to the plain import of their words . . . . "), Livingston's suggestion for Louisiana was followed by David Dudley Field in his influential draft of codes of penal law and criminal procedure for New York. *The Code of Penal Law* 5 (1865 ed.) ("fair import"); *The Code of Criminal Procedure* 470-71 (1850 ed.) ("liberal construction") (old rule had no support in any "principle of substantial justice, and . . . [its] highest aim, practically considered seem[ed] to be, to render that law inconsistent with its spirit and as a consequence, absurd and ridiculous.") Ultimately, Livingston's and Field's work formed the intellectual basis for the Federal Rules of Civil and Criminal Procedure. C. Wright & A. Miller, *Federal Practice and Procedure* § 104 (1969). Judicial hostility to change through legislation, however, was common at that time. J. Hurst, *The Growth of American Law* 186 (1950):

> "[W]here [judges] were not ready boldly to declare [it] unconstitutional, [they were ready] to interpret it so restrictively as to narrow its effect.
>
> These factors found expression in the abstract canons of statutory interpretation . . . : strict construction of statutes in derogation of the common law; strict construction of penal statutes, or of legislation that imposed 'drastic' burdens, or of legislation that imposed special damages . . . .
>
> The effect was to put a primarily obstructive, if not destructive, connotation on the process of statutory interpretation."

same fashion whether the character of the suit is criminal or civil. *Alcorn County, Miss. v. U.S. Interstate Supplies, Inc.*, 731 F.2d 1160, 1170-71 (5th Cir. 1984); *Slattery v. Costello*, 586 F. Supp. 162, 164 (D.D.C. 1983) ("hard pressed to justify a narrower construction of RICO's civil cause of action than afforded RICO's criminal provisions.").[17]

The public and private civil enforcement provisions of RICO are modeled on, but are not identical to, the antitrust laws.[18] Like the antitrust laws, RICO creates "a private enforcement mechanism that . . . deter[s] violators . . . [and] provide[s] ample compensation to the victims." *Blue Shield v. McCready*, 457 U.S. 465, 472 (1982). A private

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Legislatures reacted: "[I]t became standard practice in drafting statutes to insert a preamble stating broadly the purpose of the act and to close with a provision declaring that the statute should be liberally construed." D. Wigdor, *Roscoe Pound: Philosopher of Law* 174 (1974); see also, E. Patterson, *Jurisprudence: Men and Ideas of the Law* 421 (1953). In fact, a majority of states has abolished the common law rule. The statutes and relevant decisions are collected in *Civil Action* at 245 n.25. The reliance of *Sedima*, 747 F.2d at 188 n.17 on *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892) in arguing for a contrary view is misplaced in light of *TVA v. Hill*, 437 U.S. 153, 187 n.33 (1978). *United Steelworkers of America v. Weber*, 443 U.S. 193, 201-03 (1979), a civil rights decision, did not purport to reestablish *Church of the Holy Trinity* as a general rule. *See Rubin v. United States*, 449 U.S. 424, 430 (1981) (*Hill* followed).

[17] *See Northern Securities Co. v. United States*, 193 U.S. 197, 401 (1904) (antitrust) (Holmes, J., dissenting) ("The words cannot be read one way in a suit which is to end in fine and imprisonment and another way in one which seeks an injunction.")

[18] S. Rep. No. 617, 91st Cong., 1st Sess. 81 (1969); H.R. Rep. No. 1549, 91st Cong., 2nd Sess. 56-60 (1970). RICO and the antitrust laws are well integrated. "There are three possible kinds of force which a firm can resort to: violence (or the threat of it), deception, or market power." C. Kaysen and D. Turner, *Antitrust Policy* 17 (1959). RICO focuses on the first two; antitrust focuses on the third.

"treble-damages remedy [is needed] . . . precisely for the purpose of encouraging *private* challenges to . . . violations." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979) (emphasis in original).[19] "Private . . . litigation is one of the surest

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[19] The idea of multiple damages for certain kinds of unlawful practices has deep roots. The earliest such provision in English law was the Statute of Gloucester, 6 Edw. 1, ch. 5 (1278) (treble damages for waste). Modern antitrust statutes had their origin in the Statute Against Monopolies, 21 Jac. 1, ch. 3, § 4 (1624) (authorizing treble damages for those injured by unlawful monopolies). Parliament recognized that it was "one thing to pass statutes and . . . quite another then to insure that [they were] actually enforced." 4 W. Holdsworth, *A History of English Law* 355 (3d ed. 1945). Accordingly, "it was a common expedient [in the Middle Ages and beyond] to give the public at large an interest in seeing that a statute was enforced . . . ." *Id.* It was also an idea found in early colonial laws. *See, e.g., The Laws and Liberties of Massachusetts* 5 (pilfering and theft: treble damages), 24 (gaming: treble damages) (1648). In turn, the idea of multiple damages for various kinds of wrongs was a characteristic feature of Roman law. The "delict" of theft ran back at least to the Twelve Tables (450 B.C.). *The Institutes of Gaius* (Part I) (Text with Critical Notes and Translation by F. de Zulueta) at 217 (1958). "[T]he penalty . . . [was] four times the value of the thing stolen" when the offender was caught in the act; otherwise, it was "double." A. Watson, *The Law of the Ancient Romans* 76 (1970). Extortion was remedied by four times the loss. *Id.* at 80. Possession of stolen property was remedied by three times the value of the property. *Id.* at 77. Greek law provided for double damage if stolen property was recovered; tenfold damages otherwise. 5 C. Kennedy, *The Orations of Demosthenes*, app. VI 187 (1909) (quoting a law of Solon), *quoted in*, J. Wigmore, *Panorama of the Worlds Legal Systems* 343 (1936). Biblical law, too, reflected multiple damage recovery. *Exodus* 22:1 (theft of ox or sheep, if killed, restoration of five for ox and four for sheep); *Exodus* 22:9 (trespass to property double damages); 2 Samuel 12:1-6 (restoration of fourfold for taking of lamb).

Modern economic analysis supports the wisdom of this history. *See generally*, R. Posner, *Economic Analysis of Law* § 7.2 (2d ed. 1977). Professor (now Judge) Posner argues for private enforcement mechanisms of more than actual damages against deliberate anti-social conduct, particularly where the factor of concealment is present. *Id.* at 462 (private enforcement); 143, 272 (more than actual damages for deliberate conduct); 235 (concealment). Concealment is the sine qua non of most RICO-type behavior particularly fraud. *See GAO: Fraud In Government Programs — How Extensive Is It? — How Can It Be Controlled?* (1980) ("Most fraud is undetected. For those . . . committing fraud, the chances of being prosecuted and eventually going to jail are slim . . . . The sad truth is

weapons for effective enforcement" of the law. *Leh v. General Petroleum Corp.*, 382 U.S. 54, 59 (1965), (*quoting Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 318 (1965)). Private civil suits "provide a significant supplement to the limited resources available to the government." *Id.*[20] No need exists "to burden the private litigant beyond what is specifically set forth" in the statute. *Id.*

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that crime against the Government often does pay.") If we authorize the recovery of only actual damages for deliberate anti-social conduct engaged in for profit, we let the perpetrator know that if he is caught, he must return the misappropriated sums. If he is not caught, he may keep the money. Even if he is caught and sued, he may be able to defeat part of the damage claim or at least compromise it. In short, the balance of economic risk under traditional single damage recovery provides little economic disincentive to those who engage in such conduct. *See* R. Posner, *Antitrust Law: An Economic Perspective* 223 (1976) ("If, because of concealability, the probability of being punished for a particular . . . violation is less than unity, the prospective violator will discount (i.e., multiply) the punishment cost by that probability in determining the expected punishment cost for the violation.") In fact, as the court in *Haroco, Inc. v. American National Bank & Trust Co. of Chicago*, 747 F.2d 384, 399 n.16 (7th Cir. 1984) observed:

> [It is also true that] the delays, expense and uncertainties of litigation often compel plaintiffs to settle completely valid claims for a mere fraction of their value. By adding to the settlement value of such valid claims in certain cases clearly involving criminal conduct, RICO may arguably promote more complete satisfaction of plaintiffs' claims without facilitating indefensible windfalls.

Similarly, studies under the antitrust statute show that most treble damage suits are now settled at close to actual damages. *Study of the Antitrust Treble Damage Remedy*, Serial No. 8, House Comm. on the Judiciary, 98th Cong., 2d Sess. 14 (1984). No reason exists to believe that a similar pattern will not develop under RICO, at least in the commercial fraud area. Ironically, it may be necessary to authorize treble damages to assure that deserving victims receive actual damages in the RICO area.

[20] In fact, between 1960 and 1980, of the 22,585 civil and criminal antitrust cases brought, 84% were instituted by private plaintiffs. *U.S. Dep't of Justice Source Books of Criminal Justice Statistics 1981* 431.

While the language of a statute "must ordinarily be regarded as conclusive," it can, of course, give way to a "clearly expressed legislative intention to the contrary" found in the statute's legislative history. *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).[21] When RICO's legislative history is carefully and fully reviewed, it confirms that "Congress meant what it said." *INS v. Phinpathya*, 104 S. Ct. 584, 593 (1984). *See Civil Action* at 280:

> [A] review of the legislative history of . . . [the Organized Crime Control Act] in general, and Title IX in particular, establishes the following points beyond serious question:
>
> (1) Congress fully intended, after specific debate, to have RICO apply beyond any limiting concept like "organized crime" or "racketeering";

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[21] Four basic assumptions are integral to any principled effort to interpret a statute. F. Dickerson, *The Interpretation and Applications of Statutes* 7-12 (1975): (1) legislative supremacy within the constitutional framework (U.S. Const. art. I, § 1); (2) the use of the statutory vehicle to exercise that supremacy; (3) reliance on accepted means of communication; and (4) reasonable availability of the statutory vehicle to those to be governed by it, not only its text, but any other part of its legislative context that serves to give it meaning.

See L. Hand, "The Contribution of an Independent Judiciary," in *The Spirit of Liberty* 119-20 (I. Dilliard ed., Vintage ed. 1959):

> 'Enacted law[s]' . . . [are] ordinarily a compromise of conflicts . . . . [T]hey should be loyally enforced until they are amended by the same process which made them. That is the presupposition upon which the compromises were originally accepted; to disturb them . . . imperils the possibility of any future settlements and . . . upsets the whole system.

See also, Garcia v. United States, 105 S. Ct. 479, 483 (1984); *Blum v. Stenson*, 104 S. Ct. 1541, 1548 (1984); *United States v. Apfelbaum*, 445 U.S. 115, 121 (1980) (construction of Title II of Organized Crime Control Act).

(2) Congress deliberately redrafted RICO outside of the antitrust statutes, so that it would not be limited by antitrust concepts like "competitive," "commercial," or "direct or indirect" injury;

(3) *Both* immediate victims of racketeering activity *and* competing organizations were contemplated as civil plaintiffs for injunction, damage, *and* other relief;

(4) Over specific objections raising issues of federal-state relations and crowded court dockets, Congress deliberately *extended* RICO to the general field of commercial and other fraud; and

(5) Congress was well aware that it was creating important new federal criminal and civil remedies in a field traditionally occupied by common law fraud. (emphasis in original).

II. RICO DOES NOT REQUIRE A PRIOR CRIMINAL CONVICTION AS A PREREQUISITE FOR A PRIVATE CIVIL SUIT.

Sedima, S.P.R.L. v. Imrex Co., Inc., 741 F.2d 482, 496, 501 (2d Cir. 1984) holds that a private litigant's right to bring a claim for relief under RICO is conditioned on a showing of a prior criminal conviction under either RICO or one of its predicate offenses. Because that holding has no support in the text, legislative history, or jurisprudence of RICO, this Court should reject it.[22]

[22] It is significant that counsel in *Sedima* did not even consider the point worthy of mention before the District Court or in the briefs in the Court of Appeals. The Court of Appeals raised the point *sua sponte*. Had *Sedima* had the benefit of adversary argument, it might have had brought to its attention the substantial policy reasons rooted in considerations of the administration of criminal RICO, matters beyond the scope of Amici interests, why Congress would *not* have required a criminal conviction as a condition for a private civil suit. It is doubtful that Congress would have equipped prosecutors with the power to use the threat of a private treble damage action to coerce a guilty plea. Nor would Congress have subjected prosecutors to the possibility of private importuning to bring RICO-related criminal prosecutions or charges of acting as stalking horses for such private interests. Similarly, it would not have undermined the credibility of complaining witnesses in RICO criminal cases by making them vulnerable to cross-examination about their hopes to obtain treble damage relief, if, but only if, the government secures a conviction.

Analysis of RICO must, of course, begin with its text. *Russello*, 104 S. Ct. at 299 (quoting *United States v. Turkette*, 452 U.S. at 580). The "assumption [is] that the legislative purpose is expressed by the ordinary meaning of the words used." *Id.* (quoting *Richards v. United States*, 369 U.S. 1, 9 (1962)). *See also Park 'N Fly, Inc. v. Dollar Park and Fly, Inc.*, 105 S. Ct. 658, 662 (1985). "The language of . . . [RICO is] the most reliable evidence of . . . [Congress'] intent . . . ." *Turkette*, 452 U.S. at 593. The plain language of RICO, however, nowhere requires that a civil defendant be "convicted," but only requires that the acts in question be "indictable," or that there be a "violation" — not a "conviction."[23]

[23] "Racketeering activity" includes any act involving certain state offenses "chargeable" and "punishable" under state law. 18 U.S.C. § 1961(A) (1982).

"Racketeering activity" also includes any act involving certain federal offenses "indictable" or "punishable" under federal law. 18 U.S.C. § 1961(B)(C)(D) (1982).

18 U.S.C. § 1962 sets out that conduct that is unlawful under RICO. It prohibits certain investments, acquisitions and operations involving racketeering activity.

18 U.S.C. § 1963 provides that "[w]hoever *violates* any provision of Section 1962" may be criminally sanctioned.

18 U.S.C. § 1964(a) provides that district courts have jurisdiction to prevent and restrain "*violations* of Section 1962."

18 U.S.C. § 1964(b) authorizes the Attorney General to institute suits under Section 1964.

18 U.S.C. § 1964(c) authorizes "[a]ny person injured in his business or property by a *violation* of Section 1962" to sue.

For the purposes of this analysis, the key words are "chargeable," "indictable," "punishable" and "violation."

The Organized Crime Control Act is "a carefully crafted piece of legislation." *Iannelli v. United States*, 420 U.S. 770, 786-89 (1975). Accordingly, it is significant that when Congress wanted to say "conviction," it said "conviction," not "violation."[24]

Sedima suggests that "had Congress considered . . . [a criminal conviction limitation] it would have explicitly required previously established convictions in the context of section 1964(c)." 741 F.2d at 501. The record contradicts *Sedima*'s suggestion that Congress did *not* consider the question. Congressman (now Judge) Mikva, a vocal and knowledgeable[25] opponent of RICO in the House Judiciary Committee and on the House floor, specifically objected that RICO's private claim for relief might lead to the federalization of state offenses and frivolous law suits that would harass legitimate business. Accordingly, he proposed an

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The ordinary meaning of the suffix "able" is "capable of, fit for, or worthy of (being so acted upon or toward) — chiefly in adjectives derived from verbs . . . ." *Webster's Third New International Dictionary* 4 (unabridged) (1961). Accordingly, it does *not* mean, in fact, so acted upon.

The ordinary meaning of the term "violation" is "an infringement or transgression." *Id.* at 2554. Accordingly, it is *not* limited to criminal infringements or transgressions.

[24] 18 U.S.C. § 1963(c) (1982) ("conviction") (provision dealing with seizure); 18 U.S.C. § 3575(e)(1) (1982) ("convicted," "convictions," and "conviction") (enhanced sentencing provisions for dangerous special offenders enacted as part of Title X, 84 Stat. 949 (1970)). *Sedima* asks why Congress chose "violation" rather than "forbidden" as in the antitrust statutes. 741 F.2d at 498 n.46. The court did not explain why Congress needed a specific reason to prefer modern to late Victorian word usage. *See also* "Trademark Counterfeiting Act of 1984," 98 Stat. 2182 (1984) (treble damages for "violation" of Lanham Act).

[25] Congressman Mikva, along with Senators McClellan and Hruska and Congressman Poff, the chief sponsors of the Organized Crime Control Act including its RICO provisions, served together on the National Commission on the Reform of Federal Criminal Law, from which came a number of key concepts embodied in RICO. *Civil Action* at 253 n.47.

amendment authorizing treble damages for businesses subjected to frivolous RICO suits. 116 Cong. Rec. 35,342 (1970). Pointing out the breadth of RICO, Congressman Mikva noted: "[T]here need not be a conviction under any of these laws for it to be racketeering." No member of Congress objected to Mikva's remarks or even suggested that the statute, as drafted, required convictions; they could not, for Mikva's charge was true. The House, however, soundly defeated Congressman Mikva's proposed amendment. *Id.* at 35,343.[26]

Not surprisingly, *Sedima*'s criminal conviction requirement sets it apart from the other courts of appeals that have interpreted RICO in either criminal or civil contexts. Prior criminal indictments for the predicate offenses are not required for a RICO prosecution. *United States v. Parness*, 503 F.2d 430, 441 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975). *See also Commonwealth v. Taraschi*, 475 A.2d 744, 749 (Pa. Super 1984) (no requirement of conviction of predicate crime under Pa. RICO). Indeed, the cases uniformly establish that the terms "chargeable," "indictable," and "punishable" merely incorporate the definitions of state and federal law; they play no other role. The government may, for example, bring a *federal* RICO prosecution, when it is *not* possible to bring a *state* prosecution because of a prior *not* guilty verdict. *See, e.g., United States v. Licavoli*, 725 F.2d 1040, 1047 (6th Cir. 1984). The other courts of appeals that have directly faced the issue have held that no prior criminal conviction is required in government civil suits, *Cappetto*, 502 F.2d at 1356-57, or private civil suits, *Bunker Ramo Corp. v. United Business Forms, Inc.*, 713 F.2d 1272, 1286-87 (7th Cir. 1983); *USACO Coal Co.*, 689 F.2d

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[26] The *Sedima* opinion notes (without quoting) the objections of Congressman Mikva only in the context of its general discussion of RICO's legislative history. 741 F.2d at 490 n.22.

at 95 n.1. Thus, this Court should reject the criminal conviction requirement.[27]

Adopting a prior criminal conviction requirement is a radical and an unwise departure from precedent. Yet *Sedima* seeks to justify this departure, based not so much on RICO's text or legislative history, but on the Court's assessment of RICO's wisdom. RICO, the court argued, carries with it a stigma — that of "racketeer."[28] The *Sedima* majority argued that if it did not impose the criminal conviction requirement, it would have to impose a proof beyond a reasonable doubt standard. 741 F.2d at 499. Even *Haroco, Inc. v. American Nat'l Bank and Trust Co.*, 747 F.2d 384, 404 (7th Cir. 1984), considered increasing the burden of proof in the context of civil RICO.

The concerns of these courts are unfounded. Congress modeled RICO on the antitrust laws, which are also

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[27] RICO's operative terms play an identical role in both government criminal and civil litigation *and* in private civil suits. "There is a unity of verbal structure that is a symptom of an inner unity, a unity of plan and function." *Moore Ice Cream Co., Inc. v. Rose*, 289 U.S. 373, 378 (1933) (Cardozo, J.) "An interpretation of [a] statute which would render different sections inconsistent with each other cannot be the true one." *Perrine v. Chesapeake and Delaware Canal Co.*, 50 U.S. (9 How.) 172, 187 (1850) (Taney, C.J.). Accordingly, it is difficult to see how the same words are to be given such radically different constructions in government and private RICO suits. *See also Mills Music, Inc. v. Snyder*, 105 S. Ct. 638, 646 (1985).

[28] On the use of the word "racketeer" in RICO, *see Civil Action* at 250 n.41. *Compare Webster's Third New International Dictionary* 1871 (unabridged) (1961) ("use fraud or intimidation in extorting money or commercial or political advantage") *with Monsanto Chemical Co. v. Perfect Fit Products Mfg. Co., Inc.*, 349 F.2d 389, 396 (2d Cir. 1965) (Lumbard, C.J.) (trademark infringement litigation: defendant labeled "commercial racketeer"). *See also* Note *Civil RICO: The Temptation and Impropriety of Judicial Restriction*, 95 Harv. L. Rev. 1101, 1107 (1982) ("RICO claims can stigmatize defendants only if courts restrict the applicability of the broad statutory language to proven organized criminals"). Indeed, the stigma flows, if at all, from the criminal conviction, not a civil complaint or verdict.

enforced through government criminal and civil actions as well as private claims for relief, including suits for treble damages. Civil antitrust actions require no criminal conviction. *Standard Sanitary Mfg. Co. v. United States*, 226 U.S. 20, 52 (1912) (a conviction requirement would "take from the statute a great deal of its power"). Proof by a preponderance is sufficient in civil proceedings. *Ramsey v. UMW*, 401 U.S. 302, 307-11 (1971). No sound reason exists to treat RICO differently.

Perspective is called for. Our society knows no mark of shame more stigmatizing than that of Cain, yet homicide may be both murder and wrongful death. *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983). Traditionally, civil recovery for wrongful death having criminal characteristics may be obtained without showing a prior criminal conviction or meeting an increased burden of proof. *See, e.g., Louisville Evansville and St. Louis R.R. v. Clarke*, 152 U.S. 230, 235-42 (1894) ("wholly civil in character").[29] Similarly, murder may be an issue in the imposition of a constructive trust or the voiding of a bequest, yet a conviction is not required, and the homicide may be shown by a preponderance of the evidence.[30]

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[29] *See Watson v. Adams*, 187 Ala. 490, 494, 65 So. 528, 533 (1914) (wrongful death) ("Great as the love of money may be in some human beings, it cannot be presumed that to be held liable for damages is, to the ordinary man, the equivalent of the impending, unless diverted, exaction of his freedom or his life . . .") *See also, Boston and Worcester R.R. v. Dana*, 67 Mass. (1 Gray) 83, 96-100 (1854) (Rejection of English rule requiring conviction in felonious taking of goods rejected) ("If a party is compelled to wait the determination of a criminal prosecution before he is permitted to seek his private redress, he certainly has a strong motive to stifle the prosecution and compound with the felon.")

[30] *See, e.g., Small v. Rockfeld*, 66 N.J. 231, 245, 330 A.2d 335, 343 (1974) (no conviction required); *Burns v. United States*, 200 F.2d 106, 107 (4th Cir. 1952) (acquittal in criminal case not defense in civil case where murder at issue); *Uniform Probate Code* § 2-803(e) (1983) (conviction for murder not required and killing may be shown by preponderance of the evidence); *Restatement of the Law of Restitution* § 187, comment f. (1937)

The underlying problem with *Sedima*'s analysis is that it fails to recognize that society treats a criminal conviction much differently than it treats an adverse civil judgment. It is manifest that Congress did not intend to impose a criminal conviction requirement or to circumscribe RICO by increased burdens of proof.[31] Accordingly, no valid reason

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(conviction not required before imposition of constructive trust for murder). The cases are comprehensively collected and analyzed in Groom, *Proof of Crime in a Civil Proceeding*, 13 Minn. L. Rev. 556 (1929). Generally, neither a conviction nor a special burden of proof is imposed, for example, when it is necessary to show a kickback that is subject to both criminal and civil sanctions. *United States v. Acme Process Co.*, 385 U.S. 138, 146 (1966). A different rule on the burden of proof has, of course, been applied for special historical reasons in the area of fraud, but this Court has refused to extend it to remedial statutes. *Herman & MacLean v. Huddleston*, 103 S. Ct. 683, 691 n.27 (1983). State courts, too, in construing state treble damage legislation have not imposed special burdens of proof, *Jensen v. Brinks & Erb, Inc.*, 452 N.E.2d 414, 416 (Ind. App. 1983), or required a criminal conviction, *Americar Leasing, Inc. v. Maple*, 406 N.E.2d 333, 335 (Ind. App. 1980). *See also Senfeld v. Bank of Nova Scotia Trust Co.*, 450 So. 2d 1157, 1163-64 n.9 (Fla. App. 1984). State RICO legislation generally requires on its face neither a conviction nor a special burden of proof. *See* Appendix A. This Court has rejected such state legislative policy choices on burden of proof in civil proceedings and has imposed special requirements on federal legislation only in narrow classes of areas. *Stantosky v. Kramer*, 455 U.S. 745, 766-67 (1982) (termination of parental rights), *Addington v. Texas*, 441 U.S. 418, 433 (1979) (involuntary civil commitment); *In re Winship*, 397 U.S. 358, 361-368 (1970) (juvenile delinquency); *Woodby v. INS*, 385 U.S. 276, 285-86 (1966) (deportation). *See generally* 9 J. Wigmore, *Evidence*, § 2498 at 327 (3d ed. 1942) ("Policy suggests that . . . [the reasonable doubt rule] should be strictly confined to its original field and that there ought to be no attempt to employ it in any civil case."); *Civil Action* 258 n.59 (legislative history of RICO reviewed under prevailing jurisprudence: preponderance proper standard).

[31] The imposition of a criminal conviction requirement would have a debilitating effect on the private civil claim for relief, and its adoption would amount to the de facto rejection of the concept of the private attorney general embodied in the very design of RICO. No separate statistics on RICO legislation are kept by the Administrative Office of the United States Courts. Nevertheless, it may be possible to make order of magnitude estimates from the information published. *See generally, Annual Report of the Director of the Administrative Office of the United States Courts* (1983). Approximately 250,000 civil cases are filed each year in U.S. district court. *Id.* at 122. Approximately 35,000 criminal-prosecutions are brought. *Id.* at 164. Slightly more than 95,000 of the civil cases involve the United States as a plaintiff or defendant; private litigation comprises approximately 145,000 filings, of which 60% is federal question and 40% is diversity litigation. *Id.* at 121. The principal areas of litigation are recovery of overpayments and enforcement of judgments (41,000), prisoner petitions (30,000), social security (20,000), civil rights (20,000) and labor (11,000). *Id.* at 122. Antitrust includes 1,200 civil filings, *id.*, and 74 criminal cases. *Id.* at 164. All criminal prosecutions of extortion, racketeering and threats amount to 478. *Id.* at 320. Securities, commodities, and exchange related civil filings make up 3,000, *id.* at 122, and 26 criminal cases. *Id.* at 319. Fraud related civil filings make up 1,848. *Id.* at 245. Accordingly, if most securities and fraud-related cases were also RICO cases, RICO filing would not exceed 5,000, not more than 2% of all federal filings. How much new litigation, particularly in the fraud area, RICO will draw into the federal courts cannot be reliably determined. It is doubtful, however, that the amount will be relatively high, as most significant commercial litigation is now in the federal courts under other federal statutes or diversity jurisdiction. On the litigation explosion, *see* Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. Rev. 4 (1983). What these data do show, particularly in the antitrust and securities areas, is that the prior criminal conviction limitation would reduce civil RICO litigation to the point where its promise of "enhanced sanctions and new remedies," 84 Stat. 923 (1970), would be hollow, if not wholly broken.

exists to impose a criminal conviction requirement on private civil RICO. *Blue Chips Stamps v. Manor Drug Store*, 421 U.S. 723, 748 (1975) ("[T]he Judiciary may not circumscribe a right which Congress has conferred because of any disagreement it might have with Congress about the wisdom of creating so expansive a liability.").

CONCLUSION

This Court should reject the judicial effort to read into civil RICO a prior criminal conviction requirement.[32]

Respectfully Submitted,

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[32] The comments of Congressman Steiger in the closing hours of the House debate on the Organized Crime Control Act are worth noting:

> [I]n this country today, if a poor man's son commits a crime and a rich man's son commits the same crime, the chances are that the poor man's son will receive the full weight of justice and the rich man's son will either get off or receive a much lighter sentence. It is unfortunate, but this is a fact of life.
>
> I will submit to all of you distinguished members of the bar that is exactly what happened with organized crime. It is a fact of life. Because of the sophistication, because of the wealth, and because of the ability of organized crime to keep the best counsel, they have been able to abrogate the law. 116 Cong. Rec. 35,355 (1970).

If the "sophisticated" argument of the *Sedima* opinion is accepted, Congressman Steiger will have proven himself not only a sponsor of civil RICO, but a prophet of its fate in the hand of the courts.

Appendix A

RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS STATUTE (18 U.S.C. 1961-1968)

As amended, October 25, 1984

§ 1961. Definitions

As used in this chapter —

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2320 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States

Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred

in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

§ 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an

unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern of racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

§ 1963. Criminal penalties

(a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States, irrespective of any provision of State law —

(1) any interest the person has acquired or maintained in violation of section 1962;

(2) any —

(A) interest in;

(B) security of;

(C) claim against; or

(D) property or contractual right of any kind affording a source of influence over;

any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962; and

(3) any property constituting, or derived from, any proceeds which the person obtained, directly and indirectly, from racketeering activity or unlawful debt collection in violation of section 1962.

The court, in imposing sentence on such person shall order, in addition to any other sentence imposed pursuant to this section, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this section, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

(b) Property subject to criminal forfeiture under this section includes —

(1) real property, including things growing on, affixed to, and found in land; and

(2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities.

(c) All right, title, and interest in property described in subsection (a) vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (m) that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

(e)(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) for forfeiture under this section —

(A) upon the filing of an indictment or information charging a violation of section 1962 of this chapter and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or

(B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that —

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure

to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered:

Provided, however, That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

(2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than ten days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time, and prior to the expiration of the temporary order.

(3) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.

(f) Upon conviction of a person under this section, the court shall enter a judgment of forfeiture of the property to the United States and shall also authorize the Attorney General to seize all property ordered forfeited upon such terms and conditions as the court shall deem proper. Following the entry of an order declaring the property forfeited, the court may, upon application of the United States, enter such appropriate restraining orders or injunctions, require the execution of satisfactory performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, or take any other action to protect the interest of the United States in the property ordered forfeited. Any income accruing to, or derived from, an enterprise or an interest in an enterprise which has been ordered forfeited under this section may be used to offset ordinary and necessary expenses to the enterprise which are required by law, or which are necessary to protect the interests of the United States or third parties.

(g) Following the seizure of property ordered forfeited under this section, the Attorney General shall direct the disposition of the property by sale or any other commercially feasible means, making due provision for the rights of any innocent persons. Any property right or interest not exercisable by, or transferable for value to, the United States shall expire and shall not revert to the defendant, nor shall the defendant or any person acting in concert with or on behalf of the defendant be eligible to purchase forfeited property at any sale held by the United States. Upon application of a person, other than the defendant or a person acting in concert with or on behalf of the defendant, the court may restrain or stay the sale or disposition of the property pending the conclusion of any appeal of the criminal case giving rise to the forfeiture, if the applicant demonstrates that proceeding with the sale or disposition of the property will result in irreparable injury,

harm or loss to him. Notwithstanding 31 U.S.C. 3302(b), the proceeds of any sale or other disposition of property forfeited under this section and any moneys forfeited shall be used to pay all proper expenses for the forfeiture and the sale, including expenses of seizure, maintenance and custody of the property pending its disposition, advertising and court costs. The Attorney General shall deposit in the Treasury any amounts of such proceeds or moneys remaining after the payment of such expenses.

(h) With respect to property ordered forfeited under this section, the Attorney General is authorized to —

(1) grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this chapter, or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this chapter;

(2) compromise claims arising under this section;

(3) award compensation to persons providing information resulting in a forfeiture under this section;

(4) direct the disposition by the United States of all property ordered forfeited under this section by public sale or any other commercially feasible means, making due provision for the rights of innocent persons; and

(5) take appropriate measures necessary to safeguard and maintain property ordered forfeited under this section pending its disposition.

(i) The Attorney General may promulgate regulations with respect to —

(1) making reasonable efforts to provide notice to persons who may have an interest in property ordered forfeited under this section;

(2) granting petitions for remission or mitigation of forfeiture;

(3) the restitution of property to victims of an offense petitioning for remission or mitigation of forfeiture under this chapter;

(4) the disposition by the United States of forfeited property by public sale or other commercially feasible means;

(5) the maintenance and safekeeping of any property forfeited under this section pending its disposition; and

(6) the compromise of claims arising under this chapter.

Pending the promulgation of such regulations, all provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the Customs Service or any person with respect to the disposition of property under the customs law shall be performed under this chapter by the Attorney General.

(j) Except as provided in subsection (m), no party claiming an interest in property subject to forfeiture under this section may —

(1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or

(2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

(k) The district courts of the United States shall have jurisdiction to enter orders as provided in this section without regard to the location of any property which may be subject to forfeiture under this section or which has been ordered forfeited under this section.

(l) In order to facilitate the identification or location of property declared forfeited and to facilitate the disposition of petitions for remission or mitigation of forfeiture, after the entry of an order declaring property forfeited to the United States the court may, upon application of the United States, order that the testimony of any witness relating to the property forfeited be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place, in the same manner as provided for the taking of depositions under Rule 15 of the Federal Rules of Criminal Procedure.

(m)(1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within

thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

(3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

(4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that —

(A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the

right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or

(B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

the court shall amend the order of forfeiture in accordance with its determination.

(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.

§ 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. In any action brought by the United States under this section, the court shall proceed as soon as practicable to the hearing and determination thereof. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefore in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

§ 1965. Venue and process

(a) Any civil action or proceeding under this chapter against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs.

(b) In any action under section 1964 of this chapter in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof.

(c) In any civil or criminal action or proceeding instituted by the United States under this chapter in the district court of the United States for any judicial district, subpoenas issued by such court to compel the attendance of witnesses may be served in any other judicial district, except that in any civil action or proceeding no such subpoena shall be issued for service upon any individual who resides in another district at a place more than one hundred miles from the place at which such court is held without approval given by a judge of such court upon a showing of good cause.

(d) All other process in any action or proceeding under this chapter may be served on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs.

§ 1966. Expedition of actions

In any civil action instituted under this chapter by the United States in any district court of the United States, the Attorney General may file with the clerk of such court a certificate stating that in his opinion the case is of general public importance. A copy of that certificate shall be furnished immediately by such clerk to the chief judge or in his absence to the presiding district judge of the district in which such action is pending. Upon receipt of such copy, such judge shall designate immediately a judge of that district to hear and determine action. The judge so designated shall assign such action for hearing as soon as practicable, participate in the hearings and determination thereof, and cause action to be expedited in every way.

§ 1967. Evidence

In any proceeding ancillary to or in any civil action instituted by the United States under this chapter the proceedings may be open or closed to the public at the discretion of the court after consideration of the rights of affected persons.

§ 1968. Civil investigative demand

(a) Whenever the Attorney General has reason to believe that any person or enterprise may be in possession, custody, or control of any documentary materials relevant to a racketeering investigation, he may, prior to the institution of a civil or criminal proceeding thereon, issue in writing, and cause to be served upon such person, a civil investigative demand requiring such person to produce such material for examination.

(b) Each such demand shall —

(1) state the nature of the conduct constituting the alleged racketeering violation which is under investigation and the provision of law applicable thereto;

(2) describe the class or classes of documentary material produced thereunder with such definiteness and certainty as to permit such material to be fairly identified;

(3) state that the demand is returnable forthwith or prescribe a return date which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying or reproduction; and

(4) identify the custodian to whom such material shall be made available.

(c) No such demand shall —

(1) contain any requirement which would be held to be unreasonable if contained in a subpoena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged racketeering violation; or

(2) require the production of any documentary evidence which would be privileged from disclosure if demanded by a subpoena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged racketeering violation.

(d) Service of any such demand or any petition filed under this section may be made upon a person by —

(1) delivering a duly executed copy thereof to any partner, executive officer, managing agent, or general agent thereof, or to any agent thereof authorized by appointment or by law to receive service of process on behalf of such person, or upon any individual person;

(2) delivering a duly executed copy thereof to the principal office or place of business of the person to be served; or

(3) depositing such copy in the United States mail, by registered or certified mail duly addressed to such person at its principal office or place of business.

(e) A verified return by the individual serving any such demand or petition setting forth the manner of such service shall be prima facie proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

(f)(1) The Attorney General shall designate a racketeering investigator to serve as racketeer document custodian, and such additional racketeering investigators as

he shall determine from time to time to be necessary to serve as deputies to such officer.

(2) Any person upon whom any demand issued under this section has been duly served shall make such material available for inspection and copying or reproduction to the custodian designated therein at the principal place of business of such person, or at such other place as such custodian and such person thereafter may agree and prescribe in writing or as the court may direct, pursuant to this section on the return date specified in such demand, or on such later date as such custodian may prescribe in writing. Such person may upon written agreement between such person and the custodian substitute for copies of all or any part of such material originals thereof.

(3) The custodian to whom any documentary material is so delivered shall take physical possession thereof, and shall be responsible for the use made thereof and for the return thereof pursuant to this chapter. The custodian may cause the preparation of such copies of such documentary material as may be required for official use under regulations which shall be promulgated by the Attorney General. While in the possession of the custodian, no material so produced shall be available for examination, without the consent of the person who produced such material, by any individual other than the Attorney General. Under such reasonable terms and conditions as the Attorney General shall prescribe, documentary material while in the possession of the custodian shall be available for examination by the person who produced such material or any duly authorized representatives of such person.

(4) Whenever any attorney has been designated to appear on behalf of the United States before any court or grand jury in any case or proceeding involving any alleged violation of this chapter, the custodian may deliver to such

attorney such documentary material in the possession of the custodian as such attorney determines to be required for use in the presentation of such case or proceeding on behalf of the United States. Upon the conclusion of any such case or proceeding, such attorney shall return to the custodian any documentary material so withdrawn which has not passed into the control of such court or grand jury through the introduction thereof into the record of such case or proceeding.

(5) Upon the completion of —

(i) the racketeering investigation for which any documentary material was produced under this chapter, and

(ii) any case or proceeding arising from such investigation, the custodian shall return to the person who produced such material all such material other than copies thereof made by the Attorney General pursuant to this subsection which has not passed into the control of any court or grand jury through the introduction thereof into the record of such case or proceeding.

(6) When any documentary material has been produced by any person under this section for use in any racketeering investigation, and no such case or proceeding arising therefrom has been instituted within a reasonable time after completion of the examination and analysis of all evidence assembled in the course of such investigation, such person shall be entitled, upon written demand made upon the Attorney General, to the return of all documentary material other than copies thereof made pursuant to this subsection so produced by such person.

(7) In the event of the death, disability, or separation from service of the custodian of any documentary material produced under any demand issued under this section or the official relief of such custodian from responsibility for

the custody and control of such material, the Attorney General shall promptly —

(i) designate another racketeering investigator to serve as custodian thereof, and

(ii) transmit notice in writing to the person who produced such material as to the identity and address of the successor so designated.

Any successor so designated shall have with regard to such materials all duties and responsibilities imposed by this section upon his predecessor in office and with regard thereto, except that he shall not be held responsible for any default or dereliction which occurred before his designation as custodian.

(g) Whenever any person fails to comply with any civil investigative demand duly served upon him under this section or whenever satisfactory copying or reproduction of any such material cannot be done and such person refuses to surrender such material, the Attorney General may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of this section, except that if such person transacts business in more than one such district such petition shall be filed in the district in which such person maintains his principal place of business, or in such other district in which such person transacts business as may be agreed upon by the parties to such petition.

(h) Within twenty days after the service of any such demand upon any person, or at any time before the return date specified in the demand, whichever period is shorter, such person may file, in the district court of the United States for the judicial district within which such person resides, is found, or transacts business, and serve upon such

custodian a petition for an order of such court modifying or setting aside such demand. The time allowed for compliance with the demand in whole or in part as deemed proper and ordered by the court shall not run during the pendency of such petition in the court. Such petition shall specify each ground upon which the petitioner relies in seeking such relief, and may be based upon any failure of such demand to comply with the provisions of this section or upon any constitutional or other legal right or privilege of such person.

(i) At any time during which any custodian is in custody or control of any documentary material delivered by any person in compliance with any such demand, such person may file, in the district court of the United States for the judicial district within which the office of such custodian is situated, and serve upon such custodian a petition for an order of such court requiring the performance by such custodian of any duty imposed upon him by this section.

(j) Whenever any petition is filed in any district court of the United States under this section, such court shall have jurisdiction to hear and determine the matter so presented, and to enter such order or orders as may be required to carry into effect the provisions of this section.

Appendix B

The Racketeer Influenced and Corrupt Organizations Statute

WHEREAS, Congress enacted in 1970 the Racketeer Influenced and Corrupt Organizations provisions (Title IX) of the Organized Crime Control Act; and

WHEREAS, Title IX is applicable to patterns of racketeering activity involving:

1. personal violence;
2. provision of illegal goods and services;
3. corruption in private or public life; and
4. various forms of fraud; and

WHEREAS, Title IX provides important new criminal and civil sanctions to protect victims of racketeering activity, including,

1. criminal forfeiture of proceeds of racketeering activity;
2. criminal forfeiture of interests in enterprises;
3. equitable relief for the government;
4. equitable relief for victims of racketeering activity; and
5. treble damages, costs and attorneys fees for victims of racketeering activity; and

WHEREAS, twenty-two States have enacted legislation patterned after Title IX; and

WHEREAS, other States are actively considering the passage of legislation patterned after Title IX; and

WHEREAS, state and local units of government have begun to make effective use of Title IX and state legislation patterned after it; and

WHEREAS, Title IX provides important new sanctions in the area of fraud against state and local units of government; and

WHEREAS, fraud against state and local government has a multi-billion dollar annual import; and

WHEREAS, state and local units of government have found that Title IX and state legislation patterned after it are effective and essential means of redressing wrongs;

NOW, THEREFORE, BE IT RESOLVED, that the National Association of Attorneys General supports efforts by states to enact legislation patterned after Title IX and to strengthen the criminal and civil provisions of Title IX, particularly in their application to public and private civil sanctions in the area of fraud against the government; and

BE IT FURTHER RESOLVED, that the National Association of Attorneys General opposes efforts to repeal or modify, in whole or in part, the provisions of Title IX, particularly in their application to public and private civil sanctions in the area of fraud against the government; and

BE IT FURTHER RESOLVED, that the Executive Director and General Counsel of the National Association of Attorneys General is authorized to transmit this Resolution to appropriate committees of Congress, the Administration, and other appropriate individuals and associations.